87-1181

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

LARRY DEAN GAYTON,
Petitioner,

versus

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

BENTLEY C. ADAMS, III
Petitioner's Attorney

311 East Main Street
Thomaston, GA. 30286
(404) 647-3972

VIRGIL L. BROWN,
Of Counsel

P. O. Box 388
Zebulon, GA. 30295
(404) 647-8970

December 31, 1987

54 pp

PUBLISHER'S NOTE:

Original Pagination is not continuous.

QUESTION PRESENTED FOR REVIEW

DOES GEORGIA'S PROSECUTION OF PETITIONER FOR VIOLATING THE STATE'S TRAFFIC LAWS CONSTITUTE AN IMPERMISSIBLE SELECTIVE AND DISCRIMINATORY PROSECUTION PROSCRIBED BY THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE UNDER THE STATE'S SYSTEM OF ENFORCEMENT SUBSTANTIAL NUMBERS OF OTHER VIOLATORS SIMILARLY SITUATED WERE ROUTINELY GRANTED GENERAL IMMUNITY FROM PROSECUTION BECAUSE OF POLITICAL, BUSINESS AND SOCIAL CONNECTIONS AND A WILLINGNESS TO COMMIT BRIBERY WHICH CHARACTERISTICS THE PETITIONER LACKED?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to the instant proceeding.

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APPLICATION FOR WRIT OF CERTIORARI

LARRY DEAN GAYTON prays that the Writ of Certiorari issue to the Georgia Court of Appeals to review the decision of the Georgia Supreme Court dated and entered November 4, 1987, (Case No. 45135) denying petitioner's motion for rehearing of the Georgia Sqpreme Court's previous decision on October 28, 1987, wherein that court denied petitioner's Application for Certiorari to review the decision of the Georgia Court of Appeals (Case No. 74688) dated September 17, 1987. The Georgia Court of Appeals affirmed his conviction for Driving While Under the Influence of Alcohol in violation of Official Code of Georgia Annotated §40-6-391 and sustained the trial court's denial of his Motion to Dismiss the prosecution. Petitioner's Motion for Stay of the Remittitur pending possible review of his case by this court was denied by the Georgia Court of Appeals

on November 30, 1987. Because the record remains in the Georgia Court of Appeals it is prayed that the Writ be directed to that Court.

OPINIONS BELOW

Reproduced in the appendix to this petition are: (1) the Consent Order dated November 13, 1986, signed by The Honorable Tom E. Lewis, Judge, State Court of Spalding County, (2) Attorney General Bowers' letter dated August 1, 1986, to Governor Harris admitted at trial as defense exhibit "B", (3) the opinion of the Court of Appeals of Georgia dated September 17, 1987, affirming petitioner's conviction, (4) the decision of the Georgia Court of Appeals denying the petitioner's Motion for Rehearing dated September 30, 1987, (5) the decision of

the Georgia Supreme Court dated October 28, 1987, denying petitioner's Application for Writ of Certiorari, (6) the order of the Georgia Supreme Court dated November 4, 1987, denying petitioner's Motion for Rehearing, and (7) the order of the Georgia Court of Appeals denying Petitioner's Motion for Stay of the Remittitur.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) which authorizes the grant of the Writ of Certiorari to the highest court of a State in a case where a right, privilege or immunity is specially claimed under the Constitution of the United States. The Georgia Supreme Court denied petitioner's timely motion for rehearing on November 4,

1987. In accordance with rule 20(1) of this Court, this Application for Certiorari is filed within sixty (60) days of the entry of the Judgment of the Georgia Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

LARRY DEAN GAYTON was convicted upon his plea of guilty of the offense of

Driving While Under the Influence of Alcohol in violation of O.C.G.A. §40-6-391 on November 18, 1986, in the State Court of Spalding County, Georgia. Prior to conviction he had moved to dismiss the prosecution contending that he had been selectively prosecuted in violation of his 14th Amendment constitutional right to equal protection of the laws. The motion was denied.

Petitioner's challenge centered upon the findings of the highly publicized Georgia Bureau of Investigation (GBI) investigation of the Georgia State Patrol (GSP) which exposed the widespread "ticket fixing" practices of that agency continuing contemporaneously with the time of the petitioner's arrest by a GSP Trooper. The trial court had before it: (1) the GBI report on the ticket fixing

investigation, known as GBI case number 30-0065-86; (2) a letter from Georgia Attorney General Michael Bowers to Governor Joe Frank Harris dated August 1, 1986; and (3) a draft copy of an unsigned, undated resolution of the State of Georgia Board of Public Safety. In consideration of petitioner's release of certain witnesses, including the Governor and the Attorney General, the State, with the concurrence of the trial court, entered into a consent order which provided that these documents would, "be considered in like manner as if it had been testified to in open court on direct and cross examination", including the "conclusion[s], statements, or other information contained therein". The consent order further provided that if petitioner's motion to dismiss alleging selective prosecution was

denied upon a consideration of this evidence, the petitioner could stipulate to the facts indicating his guilt and plead guilty, but retain the right to appeal the issues presented in that overulled motion.

The Bowers letter and GBI report established the existence of a corrupt statewide system of selective traffic law enforcement of shocking proportions. They proved:

1. The "fixing" of traffic tickets within the GSP is widespread.

2. Ticket fixing is often done in response to pressure from high GSP officials.

3. Ticket fixing as a "prevalent" practice in the GSP, had not been halted but was indeed a "severe, historic, and present problem."

4. In return for certain favors (free lodging, meals and liquor) to key GSP supervisory personnel employees of Callaway Gardens and their families were granted "general immunity" from prosecution for traffic offenses.

5. The GBI investigation wasdiscontinued before the full extent of the practice could be ascertained because it was thought only "more of the same" would be discovered and because much of the records of the ticket fixing incidents had been destroyed by the GSP in contravention of specific instructions by the Attorney General.

6. Only 26% of the documents subpoenaed by the GBI from the GSP were produced as the GSP had destroyed some 74%.

7. Well over 90% of the sworn GSP

employees intereviewed in the GBI investigation had voided traffic citations for reasons other than clerical errors, had changed or reduced charges on citations for reasons other than mistakes of law or had recommended the dismissal of traffic cases for reasons other than evidentiary problems. Most had committed these practices on multiple occasions.

9. Overall some 36.0 percent (and as high as 44.4 percent in one troop) of the troopers interviewed advised the GBI that they had knowledge of or involvement in fixing tickets in exchange for gratuities or under pressure from superiors in the GSP.

10. Other reasons for fixing tickets included "requests from other troopers, other state or local law enforcement officers, superiors in the GSP, political

figures, public officials and friends."

In short, the GBI report and Bowers' letter showed a widespread and insidious pattern of official corruption and discrimination.

The state made no showing that the practice of "fixing" traffic tickets because of constitutionally impermissible reasons such as payoffs and political and social influence had been halted at the time of petitioner's arrest and prosecution.

The trial court issued no written opinion in its denial of petitioner's Motion to Dismiss the prosecution but merely entered a judgment of conviction. On appeal the Georgia Court of Appeals, while acknowledging the petitioner had proven the existence of a practice which, "surreptitiously probably continues",

found no denial of equal protection. The opinion, authored by Judge Birdsong, focused on the failure of petitioner's evidence to specifically quantify the number of tickets which had been fixed or prove the presence of a "vindictive" motive towards the petitioner in his prosecution:

> It is undisputed that an unknown number of citizens of Georgia had driving tickets, including moving traffic violations as well as DUI charges, "fixed." The evidence reflects that the investigation uncovered numerous tickets being fixed as the request of wealthy citizens, politically prominent personages, sports figures, and persons conferring privileges or personal goods in exchange for the fixing of tickets. The practice appears to have been the result of personal favors being exercised by members of the State patrol or at the direction of higher authority in the State Patrol. The number of such fixed tickets is apparently not discoverable inasmuch as records are not available or do not reflect the transmutations from a more serious offense to a less

serious or dismissed disposition. It is clear however that within the overall number of traffic offenders, including DUI offenses, within this state, the number of tickets "fixed" is small, and, human vice being what it is, surreptitiously probably continues.

Within this context, we are required to evaluate the claim of selective prosecution. It is clear that within the contemplation of the law applicable to the theory of selective prosecution, that to succeed on a claim of selective prosecution, Gayton has the burden of showing: (1) that other similarly situated uniformly have not been prosecuted, and (2) that the allegedly discriminatory prosecution of himself was based upon an impermissible motive. SABEL v. STATE, 250 Ga. 640, 643 (4) (300 S.E.2d 663). Related within this same context, we can find no indication of a vindictive prosecution for there is no evidence that the State sought to prosecute Gayton or to increase the punishment for the offense of DUI in response to his exercise of any of his constitutional rights. See UNITED STATES v. BURT, 619 F2d 831 (9th Cir. 1980).

The fact that some persons are wrongly singled out for special favor does not justify a charge of discrimination or selective

prosecution by those who are not.

GAYTON v. STATE, ___ Ga. App. ___, at _____.

REASONS FOR GRANTING THE WRIT

Over one hundred years ago this court recognized that even a measure fair on its face, if administered in a partial and unduly discriminatory manner, could violate the equal protection guarantees of the 14th Amendment. In that decision, YICK WO v. HOPKINS, 118 U.S. 356 (1886), Justice Matthews writing the opinion of the court noted:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

YICK WO, supra, 118 U.S. 373-374.

In a more recent pronouncement this court in OYLER v. BOLES, 368 U.S. 448 (1962), had occasion to address the application of the discriminatory enforcement doctrine of YICK WO, supra, in the context of the West Virginia habitual ciminal statute. There, the defendant simply asserted that others similarly situated were not prosecuted as he had been. In rejecting the defendant's contention that his allegations demonstrated a denial of equal protection the court stated:

> [T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable classification such as race, religion, or arbitrary classification. Therefore grounds

> supporting a finding of a denial of equal protection were not alleged.
>
> OYER, supra, 368 U.S. at 456.

In WAYTE v. UNITED STATES, 470 U.S. _ __, 84 L.Ed 2d 547 (1985), the court further defined the applicable standard:

> As we have noted in a slightly different context, however, although prosecutorial discretion is broad, it is not "'unfettered.' Selectivity in the enforcement of criminal laws is . . .subject to constitutional constraints". [cits ommitted]. In particular, the decision to prosecute may not be "'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,'" [cits ommitted], including the exercise of protected statutory and constitutional rights...
>
> WAYTE, supra, 84 L.Ed 2d at 556.

In the matter sub judice the petitioner's evidence unequivocally established the State of Georgia by and through the GSP utilized an enforcement scheme which arbitrarilly recognized two

classes of motorists: (1) the "immune" class which consisted of substantial numbers of motorists with political, social and financial clout willing to exchange "favors" such as free lodging, food and liquor for that immunity; and (2) the "non-immune" class which consisted of all other motorists. It is undisputed that this was a "deliberate" policy approved at the very highest levels of the GSP. By the admission of the Attorney General of Georgia but for petitioner's arbitrary classification as a member of the "non-immune" class this petitioner would certainly not have been prosecuted as the first class had de facto "general immunity" from prosecution.

While the Georgia courts have concluded, "[t]he fact that some persons are wrongly singled out for special favor does not justify a charge of discrimination or

selective prosecution by those who are not", the highest courts of some other states would probably find proof of this nature sufficient to constitute a prima facie case of selective prosecution.

In MURGUIA v. MUNICIPAL COURT OF BAKERSFIELD, 124 Cal. 204, 540 P2d 44 (1975), the defendant contended his prosecution for certain traffic offenses was motivated by his membership in the United Farm Workers Union. The trial court denied the defendant's motion to require the State to produce certain documentary evidence needed to support his claim of selective prosecution ruling that the defense of selective prosecution was not available in a criminal case. In remanding the Supreme Court of California noted:

> . . . [T]he OYLER decision clearly indicates that if a defendant does establish that the prosecuting

> authorities, in administering a statute, have followed an enforcement policy, "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," a denial of equal protection will have been demonstrated. . .

MURGUIA, supra, 540 P2d at 53.

In WISCONSIN v. JOHNSON, 246 N.W.2d 503 (1976), the defendants, two females accused of prostitution, contended the prosecution was violative of equal protection because the complainant, their "customer", was not also charged although the alleged criminal acts had been completed and the defendants paid $100.00 each. The trial court had granted the defendants' motion to dismiss apparently purely on the facts of that particular case. The Wisconsin Supreme Court remanded the case for a hearing to determine whether the prosecutor had a valid reason for not charging the patron:

> There may be valid prosecutorial reasons for prosecuting a prostitute and not the patron under given circumstances such as organized commercial prostitution, immunity from prosecution to testify, and others. Nor can one or few isolated incidents of failure to prosecute both be sufficient grounds to escape prosecution for a criminal act upon which equal protection grounds. To avoid prosecution for a criminal offense upon equal protection grounds it must be shown that the failure to prosecute was selective, persistent, discriminatory and without justifiable prosecutorial discretion. (EMPHASIS ADDED)

JOHNSON, supra, 246 N.W.2d at 507.

Unlike the JOHNSON and MURGUIA courts, central to the Georgia courts' analysis was the defendant's ability to demonstrate that the class in which he was arbitrarilly placed in the state's enforcement scheme was in the minority. Aside from the fact that the petitioner's ability to accomplish this feat was hampered by the GSP destruction of the

documentary evidence which would have proved the true extent of the ticket fixing involved, this simply is not the test enunciated in the decisions of this court. Having shown that the discriminatory practice complained of was "widespread" and intentionally implemented the petitioner has made out a prima facie of denial of equal protection and, thus, the burden shifted to the state to show the practice was an exercise of valid proscecutorial descretion. JOHNSON, supra, 246 N.W.2d at 507.

CONCLUSION

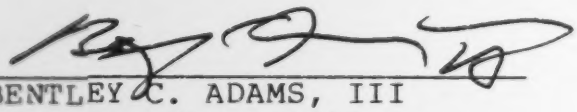
This application for certiorari merits acceptance not only because of the misapplication of the law by the Georgia courts but also the implied rationale for their decision. It must be clearly and unmistakably stated that the underlying guilt for the offense charged is totally irrelevant in a discriminatory prosecution case. The focus of the present application is not upon whether the petitioner is guilty or innocent of the Drunk Driving violation but, rather, upon the constitutional defect in the initiation of prosecution and the enforcement of the statute.

Importantly, the Georgia Supreme Court's failure to grant review of the Georgia Court of Appeal's decision in this case leaves standing a decision in

apparent total disharmony with the decisions of other state's courts of last resort. Those cases have focused upon whether the laws in question were in fact enforced in a selective fashion intentionally without a valid justification for that discrimination. Having shown the existence of a selective, intentional discriminatory scheme of enforcement with clearly no valid reason for that discrimination he would certainly have made out a prima facie defense of selective prosecution under the rulings of those other states.

The instant application for certiorari presents an issue which, if left unresolved, poses a grave threat to the integrity of the law enforcement process of this State. The rule of law under which a civilized society operates

requires the enforcement mechanism be viewed by the public as impartial, objective, and unbiased. The legal theory of selective prosecution serves as a critical safeguard against improper prosecutorial discretion and it is crucial that this theory not be so diluted that it is rendered ineffective and meaningless. The instant case threatens such a result. It presents an appropriate opportunity for this court to analyze and define the nature and breadth of this defense and to redeem its vitality upon which the Georgia courts have dangerously impinged.



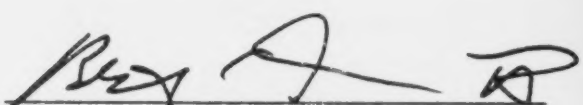
BENTLEY C. ADAMS, III
Attorney for Petitioner

311 East Main Street
Thomaston, Georgia 30286
(404) 647-3972

CERTIFICATE OF SERVICE

This is to certify that I have this date served one copy of the within and foregoing Petition for Writ of Certiorari upon MICHAEL J. BOWERS, Georgia Attorney General, Georgia Department of Law, Room 132, Judicial Building, 40 Capital Square, S.W., Atlanta, Georgia 30334 and upon JOHN NEWTON, Solicitor of the State Court of Spalding County, P. O. Box 551, Griffin, Georgia 30224 by depositing the same in the United States Mail in properly addressed envelopes with adequate postage thereon. I further certify that all parties required to be served have been served.

This 31st day of December, 1987.



BENTLEY C. ADAMS, III

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IN THE STATE COURT

OF SPALDING COUNTY, GEORGIA

CASE NO. S86R-2397

THE STATE OF GEORGIA

VS.

LARRY DEAN GAYTON,
Defendant

CONSENT ORDER

WHEREAS, Virgil L. Brown has filed defense motions on behalf of his clients that have been issued traffic citations by the Georgia State Patrol; and

WHEREAS, Virgil L. Brown has Subpoened the following:

1. Honorable Joe Frank Harris, Governor of Georgia
2. Honorable Michael J. Bowers, Attorney General of Georgia
3. D. G. Robertson, GBI
4. Col. Curtis D. Earp, Jr., GSP

testified to in open Court on direct and cross examination.

4. Any Defendant in which Virgil L. Brown is attorney of record shall have the right to enter into a plea agreement while at the same time reserving the right to appeal the denial of his motions to the appropriate Courts if such should become necessary.

5. Any Defendant in which Virgil L. Brown is attorney of record shall have the right to have a bench trial upon stipulated facts while at the same time reserving the right to appeal the denial of his motions to the appropriate Courts if such should become necessary.

6. Any Defendant in which Virgil L. Brown is attorney of record shall have the right to enter a plea of not guilty, have a jury trial and appeal his conviction if such

should come to pass.

7. Exhibit "A" and Exhibit "B" shall become part of the record and transcript pursuant to O.C.G.A. §5-6-41 and this agreement for the purpose of determining all factual matters related to Defendant's motions.

8. The purpose of this stipulation is to release all of the above-named persons from their subpoenas and to settle all matters relating to Defendant's motions save and except matters of law.

AGREED TO:

/s/ John Newton
JOHN NEWTON
Solicitor of State Court

/s/ Virgil L. Brown
VIRGIL L. BROWN
Attorney for Defendant

Upon agreement of both of the above parties, all of the above document is

hereby adopted and made the order of this Court.

THIS THE 13TH DAY OF NOVEMBER 1986.

/s/ Tom E. Lewis
TOM E. LEWIS
Judge, State Court of Spalding County

The Department of Law
State of Georgia
Atlanta
30334

Micheal J. Bowers
Attorney General

132 State Judicial
Building
Telephone 656-3300

August 1, 1986

Honorable Joe Frank Harris
Governor of Georgia
State Capitol
Atlanta, Georgia 30334

Re: Ticket Fixing in the Georgia State Patrol

Dear Governor Harris:

The Law Department staff and I have carefully reviewed the enclosed report of the Georgia Bureau of Investigation (GBI) concerning its investigation of allegations of ticket fixing in the Georgia State Patrol (GSP). In this letter I will provide you with our legal analysis of the GBI's findings.

While the GBI report speaks for itself, I believe that it is clear from the report that there is widespread ticket fixing in the GSP and that ticket fixing is often done in response to pressure from high GSP officials and others. Moreover, there is a strong inference that there is ticket fixing in return for favors. These factual conclusions have important legal

ramifications.

Although ticket fixing in many of the forms found by the GBI to exist is a felony under O.C.G.A. Section 45-11-11, I do not believe that criminal prosecutions are appropriate. First, there is simply too much of it to deal with appropriately through criminal prosecutions. Second, many of the individuals who would be witnesses in criminal prosecution have possibly been compromised because of conflicting statements made in the GSP internal investigation. Third, no single incident of ticket fixing, though it might technically be a crime, would in my judgment warrant prosecuton. Fourth, a great deal of potentially relevant evidence has been destroyed. It is worthy of note that the recent destruction of records by the GSP highlighted on Page 31 of the GBI report is directly contrary to express, written advice given to the GSP by this office on April 23, 1986.

One aspect of the GBI's findings concerning ticket does, however, merit special attention. There is a strong, if not inescapable, inference from the GBI's findings that favors from Callaway Gardens for certain GSP supervisory personnel, to include Colonel Hugh Hardison, have been given in return for a general immunity by the GSP for Callaway Gardens personnel and their family members from prosecution for traffic offense. This situation could very well involve violations of the federal Hobbs Act, which in general makes the receiving of favors because of one's official position a felony. This matter

should be referred to the United States Attorney for the Middle District of Georgia for his consideration.

On the basis of the GBI report, I strongly recommend that immediate administrative action be taken to halt the ticket fixing practices prevalent in the GSP. Because these practices often violate the felony provisions of O.C.G.A. Section 45-11-1, they cannot be tolerated in any law enforcement agency. Second, when pressure and coercion in relation to personnel actions are used to cause tickets to be fixed, all GSP supervisory personnel as well as Board of Public Safety members who are aware of such conduct incur substantial civil liability rishs for violations of the pressured or coerced employee's rights.

Whatever administratiove actions you and the Board of Public Safety determine to be appropriate to stop the practices found to exist, at a bare minimum I recommend the following:

1. Adoption of a policy to prohibit ticket fixing with the requirement for a detailed monthly report to the board of Public Safety of all tickets voided or altered by the GSP; and

2. Adoption of a policy requiring Board approval until further notice for the initiation by the GSP of any promotions or adverse personnel actions. This is to prevent retaliation against those who have cooperated during this investigaiton.

Additionally, there is the matter of Colonel Hardison's purchase of a 1985 Ford LTD. The nub of this matter is that the purchase was for approximately $1500.00 less than it otherwise would have been because of the false report of the mileage on the automobile, 28,143 versus no more than 528. There is a strong inference that the false report was at least partially the result of Colonel Hardison's actions, but the evidence is not conclusive. I believe that it is fair to say that there exists probable cause to believe that a crime, theft by taking, occurred but that proof of such crime beyond a reasonable doubt is problematic; therefore, I do not reommend prosecution for this matter at this time.

Finally, notwithstanding the GBI's findings and this analysis, I am convinced that the overwhelming majority of GSP personnel are honest and committed to what is right. The crux of the problem at this time is a failure of leadership in the GSP. It is not for me as Attorney General to say who should lead the GSP, but I cannot fail to recommend immediate remedial action concerning how it is led. Otherwise, despite administrative measures and even legal action, the situation will not likely change. I do not recommend further investigation of the allegations of ticket fixing. In all likelihood, the GBI would simply be finding more of the same, and this would tell us no more than we already know. Most importantly, cumulative evidence concerning the practice of ticket fixing is not required

to achieve the primary goal which we must now achieve, namely, to halt the paractice as soon as possible.

I am prepared at your convenience to discuss this matter in greater detail.

Sincerely yours,

/s/ Michael J. Bowers
MICHAEL J. BOWERS
Attorney General

MJB:lc
Enclosure
cc: Mr. James R. Hamrick
Director, GBI

IN THE COURT OF APPEALS OF GEORGIA

September 17, 1987

74688. GAYTON v. THE STATE. (Bi-123)

BIRDSONG, CHIEF JUDGE.

Larry Dean Gayton was convicted upon his plea of guilty of the offense of driving under the influence. With the joint consent of the prosecutor and the trial court, Gayton secured the asserted right to file an appeal based upon a claim of selective prosecution notwithstanding his plea of guilty.

Held:

Though we are of the opinion that a plea of guilty waives any asserted trial errors (TAYLOR v. STATE, 169 Ga. App. 779 (315 SE2d 288)), we will honor the promise of the right of appeal upon the issue stipulated by agents of the State. See State v. Hanson, 249 Ga. 739 (295 SE2d

297). Gayton bases his claim of illegal prosecution upon an unfair and discriminatory selectivity for prosecution for the crime of DUI. This claim arises directly out of the investigation of the conduct of the Director of the Georgia State Patrol and the members of several of that agency's district offices. The trial court admitted as evidence the investigation of the State Patrol by the GBI as well as a memorandum from the Attorney General outlining an independent investigation of the same subject. It is undisputed that an unknown number of citizens of Georgia had driving tickets, including moving traffic violations as well as DUI charges, "fixed." The evidence reflects that the investigation uncovered numerous tickets being fixed at the request of wealthy citizens, politically

prominent personages, sports figures, and persons conferrring privileges or personal goods in exchange for the fixing of tickets. The practice appears to have been the result of personal favors being exercised by members of the State Patrol or at the direction of higher authority in the State Patrol. The number of such fixed tickets is apparently not discoverable inasmuch as records are not available or do not reflect the transmutations from a more serious offense to a less serious or dismissed disposition. It is clear however that within the overall number of traffic offenders, including DUI offenses, within this state, the number of tickets "fixed" is small, and, human vice being what it is, surreptitiously probably continues.

Within this context, we are required to evaluate the claim of selective

prosecution. It is clear that within the contemplation of the law applicable to the theory of selective prosecution, that to succeed on a claim of selective prosecution, Gayton has the burden of showing: (1) that others similarly situated uniformly have not been prosecuted, and (2) that the allegedly discriminitory prosecution of himself was based upon an impermissibe motive. SABEL v. STATE, 250 Ga. 640, 643 (4) (300 SE2d 663). Related within this same context, we can find no indication of a vindictive prosecution for there is no evidence that the State sought to prosecute Gayton or to increase the punishment for the offense of DUI in response to his exercise of any of his constitutional rights. See UNITED STATES v. BURT, 619 F2d 831, 836 (9th Cir. 1980).

The fact that some persons are wrongly singled out for special favor does not justify a charge of discrimination or selective prosecution by those who are not.

The burden was on Gayton to prove a selective prosecution by showing (1) that others generally are not prosecuted for the same misconduct, and (2) the decision to prosecute Gayton was based upon imperimissible grounds such as race, religiion or exercise of sonstitutional rights. SABEL v. STATE, supra. While Gayton has shown that through the improper acts of a few state law enforcement officials a select few citizens have escaped the penalty of the law for DUI violations, there is a failure to establish that DUI offenders generally are not punished. Likewise, there is no

evidence in this record that Gayton was treated any differently than the vast majority of other DUI offenders in this state. Certainly there is no evidence that Gayton was selected for punishment because of his race, religion, or exerise of constitutional rights.

It is clear that all prosecutions are to some degree selective. Prosecutors and law enforcement officials in the execution of their duties constantly and routinely practice some degree of selectivity in deploying their limited enforcement resources. Thus selective prosecution based upon necessity and legal actions clearly is not prohibited. UNITED STATES v. BURT, supra. Gayton has not shown successfuly that he has been singled out for prosecution for impermissible reasons by showing that a comparatively few

citizens for improper reasons have not been prosecuted for the same crime. SABEL v. STATE, supra. We find no merit in this enumeration.

Judgment affirmed. Deen, P. J., and Pope, J., concur.

COURT OF APPEALS OF THE STATE OF GEORGIA

Atlanta, September 30, 1987

The Honorable Court of Appeals met pursuant to adjornment. The following order was passed:

74688. LARRY DEAN GAYTON v. THE STATE

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Victoria McLaughlin
VICTORIA MCLAUGHLIN, Clerk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta, October 28, 1987

Case No. 45135. GAYTON v. THE STATE

The Supreme Court today denied the writ of certiorari in this case. All the justices concur.

Very truly yours

JOLINE B. WILLIAMS, Clerk

IN THE SUPREME COURT OF GEORGIA

Decided: November 4, 1987

The motion for reconsideration was denied today:

Case No. 45135 GAYTON v. THE STATE

All justices concur

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA

November 30, 1987

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

74688. LARRY DEAN GAYTON v. THE STATE

Having considered the appellant's motion to stay the remittitur pending his application for writ of certiorari before the United States Supreme Court, that the moion is hereby denied pursuant to Rule 49 of the Rules of the Court of Appeals.

COURT OF APPEALS OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

November 30, 1987

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/Victoria McLaughlin
VICTORIA McLAUGHLIN, Clerk

87-1181

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

LARRY DEAN GAYTON,
Petitioner,

versus

THE STATE OF GEORGIA,
Respondent.

SUPPLEMENTAL APPENDIX

BENTLEY C. ADAMS, III
Petitioner's Attorney

311 East Main Street
Thomaston, GA. 30286
(404) 647-3972

VIRGIL L. BROWN
Of Counsel

P. O. Box 388
Zebulon, GA. 30295
(404) 647-8970

January 8, 1988

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The Department of Law
State of Georgia
Atlanta
30334

Micheal J. Bowers
Attorney General

132 State Judicial
Building
Telephone 656-3300

August 1, 1986

Honorable Joe Frank Harris
Governor of Georgia
State Capitol
Atlanta, Georgia 30334

Re: Ticket Fixing in the Georgia State Patrol

Dear Governor Harris:

The Law Department staff and I have carefully reviewed the enclosed report of the Georgia Bureau of Investigation (GBI) concerning its investigation of allegations of ticket fixing in the Georgia State Patrol (GSP). In this letter I will provide you with our legal analysis of the GBI's findings.

While the GBI report speaks for itself, I believe that it is clear from the report that there is widespread ticket fixing in the GSP and that ticket fixing is often done in response to pressure from high GSP officials and others. Moreover, there is a strong inference that there is ticket fixing in return for favors. These factual conclusions have important legal ramifications.

Although ticket fixing in many of the forms found by the GBI to exist is a felony under O.C.G.A. Section 45-11-11, I do not believe that criminal prosecutions are appropriate. First, there is simply too much of it to deal with appropriately through criminal prosecutions. Second, many of the individuals who would be witnesses in criminal prosecution have possibly been compromised because of conflicting statements made in the GSP internal investigation. Third, no single incident of ticket fixing, though it might technically be a crime, would in my judgment warrant prosecuton. Fourth, a great deal of potentially relevant evidence has been destroyed. It is worthy of note that the recent destruction of records by the GSP highlighted on Page 31

of the GBI report is directly contrary to express, written advice given to the GSP by this office on April 23, 1986.

One aspect of the GBI's findings concerning ticket fixing does, however, merit special attention. There is a strong, if not inescapable, inference from the GBI's findings that favors from Callaway Gardens for certain GSP supervisory personnel, to include Colonel Hugh Hardison, have been given in return for a general immunity by the GSP for Callaway Gardens personnel and their family members from prosecution for traffic offense. This situation could very well involve violations of the federal Hobbs Act, which in general makes the receiving of favors because of one's official position a felony. This matter

should be referred to the United States Attorney for the Middle District of Georgia for his consideration.

On the basis of the GBI report, I strongly recommend that immediate administrative action be taken to halt the ticket fixing practices prevalent in the GSP. Because these practices often violate the felony provisions of O.C.G.A. Section 45-11-1, they cannot be tolerated in any law enforcement agency. Second, when pressure and coercion in relation to personnel actions are used to cause tickets to be fixed, all GSP supervisory personnel as well as Board of Public Safety members who are aware of such conduct incur substantial civil liability risks for violations of the pressured or coerced employee's rights.

Whatever administrative actions you and the Board of Public Safety determine to be appropriate to stop the practices found to exist, at a bare minimum I recommend the following:

1. Adoption of a policy to prohibit ticket fixing with the requirement for a detailed monthly report to the board of Public Safety of all tickets voided or altered by the GSP; and

2. Adoption of a policy requiring Board approval until further notice for the initiation by the GSP of any promotions or adverse personnel actions. This is to prevent retaliation against those who have cooperated during this investigaiton.

Additionally, there is the matter of Colonel Hardison's purchase of a 1985 Ford LTD. The nub of this matter is that the purchase was for approximately $1500.00 less than it otherwise would have been because of the false report of the mileage on the automobile, 28,143 versus no more than 528. There is a strong inference that the false report was at least partially the result of Colonel Hardison's actions, but the evidence is not conclusive. I believe that it is fair to say that there exists probable cause to believe that a crime, theft by taking, occurred but that proof of such crime beyond a reasonable doubt is problematic; therefore, I do not reommend prosecution for this matter at this time.

Finally, notwithstanding the GBI's findings and this analysis, I am convinced that the overwhelming majority of GSP personnel are honest and committed to what is right. The crux of the problem at this time is a failure of leadership in the GSP. It is not for me as Attorney General to say who should lead the GSP, but I cannot fail to recommend immediate remedial action concerning how it is led. Otherwise, despite administrative measures and even legal action, the situation will not likely change. I do not recommend further investigation of the allegations of ticket fixing. In all likelihood, the GBI would simply be finding more of the same, and this would tell us no more than we already know. Most importantly, cumulative evidence concerning the practice of ticket fixing is not required

to achieve the primary goal which we must now achieve, namely, to halt the paractice as soon as possible.

I am prepared at your convenience to discuss this matter in greater detail.

Sincerely yours,

/s/ Michael J. Bowers
MICHAEL J. BOWERS
Attorney General

MJB:lc

Enclosures

cc: Mr. James R. Hamrick
Director, GBI

Supreme Court, U.S.
FILED
JAN 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-1181

In The

Supreme Court of the United States

October Term, 1987

LARRY DEAN GAYTON,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

NEAL B. CHILDERS
Assistant Attorney General
Counsel of Record
For Respondent

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

DARYL A. ROBINSON
Senior Assistant
Attorney General

Please serve:

NEAL B. CHILDERS
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3355

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

QUESTION PRESENTED FOR REVIEW

Whether the prosecution of Petitioner for the offense of driving under the influence (an offense of which, by his own admission, Petitioner is guilty) is nevertheless violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as a selective prosecution where a small number of traffic offenders who were wealthy citizens, politically prominent persons, sports figures, or persons conferring privileges or personal goods in exchange for favors from other law enforcement officers have not been charged with traffic offenses, when there has been no evidence or suggestion that the officer arresting Petitioner, or the Solicitor making the determination to prosecute Petitioner, had ever participated in such behavior?

PARTIES TO THE PROCEEDING

The caption contains the correct and proper names of all parties to this proceeding.

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OPINIONS BELOW

The various opinions and orders in this case are reproduced in the Appendix to the Petition for Writ of Certiorari. The opinion of the Georgia Court of Appeals of September 17, 1987, is now published at 184 Ga. App. 387 (1987).

STATEMENT OF JURISDICTION

Petitioner requests that this Court exercise the jurisdiction granted pursuant to 28 U.S.C. § 1257(3) in this matter.

STATEMENT OF THE CASE

Petitioner was charged, by accusation, with committing the traffic offenses of driving under the influence [O.C.G.A. § 40-6-391] and driving too fast for conditions [O.C.G.A. § 40-6-181(a)]. These violations were alleged to have occurred on September 12, 1986. On November 18, 1986, Petitioner appeared in the State Court of Spalding County, Georgia, and entered a plea of guilty to the charge of driving under the influence, which was accepted by the trial court. The Solicitor at that time entered a nolle prosequi on the charge of driving too fast for conditions. A Motion for a New

Trial, in Arrest of Judgment, and Notwithstanding the Verdict was filed the next day, November 19, 1986, and was subsequently denied. Petitioner subsequently filed a Notice of Appeal to the Georgia Court of Appeals, which rendered its opinion affirming the judgment below. The Georgia Supreme Court denied Petitioner's Petition for Writ of Certiorari.

The gist of Petitioner's Appeal (and of the Petition for Writ of Certiorari) is his claim that, because members of the Georgia State Patrol other than the arresting officer on occasion "fixed" tickets for politicians, and other persons of influence, or declined to make charges against them in the first instance, his admittedly criminal conduct should be excused and he should be granted immunity to violate the laws of the State of Georgia. Respondent's position, stated simply, is that Petitioner may not be granted such immunity. The evidence of record discloses not even the slightest suggestion that the officer who arrested Petitioner had ever participated in the "fixing" of tickets, nor is there any evidence of record that the prosecutor of the State Court of Spalding County had ever participated in such behavior, either. In ruling on Petitioner's claim, the Georgia Court of Appeals held that:

> The fact that some persons are wrongly singled out for special favor does not justify a charge of discrimination or selective prosecution by those who are not.

Gayton v. State, 184 Ga. App. 387, 388 (1987).

REASONS FOR DENIAL OF THE WRIT

A. PETITIONER'S PLEA OF GUILTY TO THE CHARGES CONSTITUTED A WAIVER OF ANY AND ALL DEFENSES TO THE CHARGE WHICH PETITIONER MAY HAVE POSSESSED.

As noted *supra*, Petitioner appeared before the State Court of Spalding County to answer the charges brought against him. With the advice and assistance of counsel, Petitioner entered a plea of guilty to the offense of driving under the influence. As a matter of federal law, once a criminal defendant has admitted in open Court that he is in fact guilty of the offense with which he is charged, he may no longer raise independent claims relating to the deprivation of constitutional rights prior to the entry of the plea, but:

> [M]ay only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not ["within the range of competence demanded of attorneys in criminal cases."]

Tollett v. Henderson, 411 U.S. 258, 266-67 (1973) [material in brackets quoted from *McMann v. Richardson*, 397 U.S. 759, 771 (1970)].

In the case at bar, of course, Petitioner has entered a plea of guilty to the charge of driving under the influence in the Georgia trial court. Neither his Appeal to the Georgia Court of Appeals, nor the Petition for Writ of Certiorari, challenges the voluntary and intelligent character of that plea, or even suggests that the advice given him by counsel was not at least minimally competent. In any event, such a claim may not first be

raised before the United States Supreme Court. *Tollett, supra,* at 269. Accordingly, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied, as Petitioner's voluntary and intelligent plea of guilty to the charge of driving under the influence waived any right which he might have had to raise a defense of selective prosecution.

B. PETITIONER'S ARREST AND PROSECUTION WERE ENTIRELY CORRECT AND PROPER, AND PETITIONER HAS NOT SHOWN ANY IMPROPER MOTIVATION OF THE ARRESTING OFFICER OR SOLICITOR WHICH WOULD WARRANT THE REVERSAL OF HIS CONVICTION.

The gist of Petitioner's contention is simple: that, because some members of the Georgia State Patrol, on occasion, declined to prosecute certain individuals for violations of Georgia's traffic laws, Petitioner should be given judicial license to drive on Georgia's highways while intoxicated. Petitioner contends, based upon an investigation of the Georgia Department of Public Safety conducted by agents of the Georgia Bureau of Investigation, that various influential persons have been given, in effect, immunity from prosecution for violations of the traffic laws, and asserts that he is entitled to that immunity as well. The State of Georgia submits that this Court should decline to adopt his position, and should also deny the Petition for Writ of Certiorari.

The principle that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits selective prosecution was clearly

established by the United States Supreme Court in *Yick Wo v. Hopkins,* 118 U.S. 356, 373-74 (1886), wherein this Court addressed a law that required that persons using wooden buildings as laundries obtain the assent of the Board of Supervisors. Although the law was facially neutral, the evidence adduced showed that the Board of Supervisors withheld its consent from persons of Chinese ancestry, while granting assent to applicants who were non-Chinese. This Court held that such discrimination on the basis of race and nationality was prohibited by the United States Constitution. *Id.*, at 374.

This Court more recently had occasion to discuss these issues in *Wayte v. United States,* 470 U.S. 598 (1985), wherein a selective prosecution challenge was raised to the United States' passive prosecution policy with respect to individuals who refused to register with the selective service. In *Wayte,* this Court clearly ruled that the burden is on the defendant to show that the state's system of enforcement had a discriminatory effect and that that system was motivated by a discriminatory purpose. *Wayte, supra,* at 608. Decisions of the Federal Circuit Courts of Appeals have set out similar tests. *See, e.g., United States v. Berrios,* 501 F.2d 1207, 1211 (2nd Cir. 1974) (defendant must show that he has been singled out for prosecution, while others similarly situated have not been proceeded against and that the selection of the defendant for prosecution was based upon impermissible considerations); *United States v. Hayes,* 589 F.2d 811, 819 (5th Cir. 1979) (defendant must show that others similarly situated have not been prosecuted and that his prosecution is based upon impermissible considerations); *United States v. Wyman,*

724 F.2d 684, 687 (8th Cir. 1984) (same); *United States v. Wilson,* 639 F.2d 500, 504 (9th Cir. 1981) (same).

The common thread running through all of the cases which deal with a defense of selective prosecution is an allegation (whether or not successful) that the defendant has been singled out and prosecuted for an offense that virtually all other citizens are permitted to commit with impunity. In the instant case, by contrast, Petitioner is, by his own admission, a member of the vast majority (specifically, "an ordinary and common citizen of the State of Georgia."). Brief of Petitioner before the Georgia Court of Appeals, at 4. Petitioner's Complaint is not that he is a member of a minority singled out for prosecution, but, rather, that he has been denied entrance to the privileged minority who has not been prosecuted. Indeed, a review of Petitioner's Brief filed before the Georgia Court of Appeals reveals his "demand" to be granted immunity from prosecution for traffic offenses "as if he too were an employee of Callaway Gardens, an employee of GSP, and an influential citizen, all rolled into one." *Id.*, at 11. The rights granted by our Constitution were never meant to be applied in so perverted a fashion.

It is submitted by Respondent that Petitioner has utterly failed to meet the test set forth by this Court in *Wayte,* in that he has shown no discriminatory effect or purpose on the part of either the Trooper who arrested him or the Solicitor who prosecuted him. Indeed, the record in this case contains not a shred of evidence (or even the slightest suggestion) that the arresting officer or prosecutor in this case has *ever* "fixed" a ticket in his professional career. Whether or not other law enforcement officials have "fixed" tickets for other drivers is

simply irrelevant to the case at bar. As the Georgia Court of Appeals correctly held:

> The fact that some persons are wrongly singled out for special favor does not justify a charge of discrimination or selective prosecution by those who are not. . . .There is no evidence in this record that Gayton was treated any differently than the vast majority of other DUI offenders in this state. Certainly there is no evidence that Gayton was selected for punishment because of his race, religion, or exercise of constitutional rights.

Gayton, supra, at 388.

CONCLUSION

It is undisputed in this case that Petitioner committed the offense charged. While the State of Georgia does not condone the "fixing" of tickets, there is not a shred of evidence that the arresting officer who arrested Petitioner, or the Solicitor who prosecuted him, was motivated in any manner whatsoever by any improper purpose. Petitioner has the burden of proof in this matter; he has failed to meet that burden. As a matter of law, his prosecution did not violate any provision of the United States Constitution. Contrary to Petitioner's contentions, he has not been selectively prosecuted; indeed, his real complaint is the state's refusal to afford him special favors. Accordingly, for the above and foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

DARYL A. ROBINSON 610012
Senior Assistant Attorney General

NEAL B. CHILDERS 124410
Assistant Attorney General

Please serve:

NEAL B. CHILDERS
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3358